

COALITION OF SERVICE INDUSTRIES
SUBMISSION TO THE SERVICES AND INVESTMENT WORKSHOPS
VIII AMERICAS BUSINESS FORUM
MIAMI, FLORIDA, NOVEMBER 17-21, 2003

DISCUSSION

CSI's members are dedicated to reducing barriers to services trade. Services are critical to the development of modern information-based economies. Manufacturers and agricultural producers benefit from innovative and efficient services, such as financing, product design and engineering, marketing and distribution, outsourcing, and logistics. The FTAA holds great promise for important new trade opportunities and we strongly support FTAA Ministers' commitment to complete the negotiations by 2005.

The premise of such an agreement should be to achieve free trade in goods and services throughout the region with minimal exceptions or limitations. Certainly, liberalization of services in the FTAA must exceed what has already been achieved in the World Trade Organization (WTO) General Agreement on Trade in Services (GATS). The FTAA is an excellent opportunity to create one general framework for trade in services among the 34 participating economies.

CROSS-CUTTING ISSUES

Architecture of the Agreement: The foremost issue confronting services negotiators is how to structure the services provisions of the FTAA. CSI favors the structure of the current draft, in which all of the substantive provisions concerning services are provided in a single services chapter with cross-references to additional provisions for investment, movement of persons, and specific sectors (e.g., financial services and telecommunications) in separate annexes or chapters. In terms of the negotiating modality, CSI believes the negative list approach to the scheduling of commitments is essential if meaningful liberalization is to be achieved. Our understanding is that agreement has not yet been reached on the use of the negative list approach.

More specifically, the FTAA should: (1) cover each of the four modes of supply (cross-border, consumption abroad, commercial presence, and temporary entry of natural persons) with a negative list for any exceptions to trade commitments for each mode of supply; and (2) cross-reference more specific chapters with substantive obligations for investment, telecommunications services, and financial services.

With respect to telecommunications, the FTAA should include a combined and improved version of the GATS Telecom Annex, Basic Telecom Reference Paper, and NAFTA Chapter 13 on telecommunications with appropriate additional commitments. Such a structure will retain the substance that we need, and provide greater coherence to the provisions affecting services. While we understand that telecommunications text has been tabled, the publicly available draft contains no such chapter.

The Negotiating Approach: The overall objective of the FTAA is to achieve maximum liberalization of trade in services in the Western Hemisphere. CSI supports the U.S. Government's proposal to proceed according to the top-down, or negative list approach because we believe it is the most effective way to

achieve broad liberalization with a minimum of exceptions.

The top-down/negative list approach has substantial advantages. First, it starts from the presumption that all services should be fully liberalized, thereby putting the burden on countries seeking to limit liberalization to specify and justify their exceptions. Second, it is more transparent than alternative scheduling methodologies because: (1) a country seeking a limitation is required to do so with precision by naming the specific sector, sub-sector, mode of delivery, and measure for which the limitation is sought; and (2) countries are required to disclose all non-conforming measures (including sub-federal laws and regulations). Third, it simplifies the negotiation and implementation process by eliminating the need to negotiate agreed definitions of all services covered by the agreement.

Sub-Federal Measures: The Scope and Coverage provision of the services chapter of the draft FTAA, and article 1.7 of the investment chapter, mention the issue of sub-federal measures. CSI wants to reiterate its view that the FTAA should treat federal and sub-federal measures equally. This is important in the case of services, where many sectors are regulated by sub-federal entities. The NAFTA gave sub-federal entities the ability to take unlimited reservations and exceptions for current and future measures inconsistent with the agreement. CSI sees no reason to differentiate between federal and sub-federal obligations in this regard and we urge, subject to some isolated exceptions, that these sub-federal measures be covered by the FTAA on the same terms and within the same timeframe, as are federal measures.

Most Favored Nation Treatment (MFN): An FTAA will need to take account of existing trade agreements already in place or under negotiation among its participants that extend preferences not otherwise covered by the FTAA. This, of course, is an issue that affects all aspects of the FTAA, not just services. While it seems necessary to respect preferences that are found in these agreements, we are concerned that the FTAA will have little value without some standard with respect to the recognition of the various agreements. We would suggest that, at a minimum, the WTO standard concerning Free Trade and Economic Integration Agreements, found in GATT Article XXIV.6 and GATS Article V, should be applied in the FTAA. This standard recognizes those preferences that are extended only in comprehensive free trade agreements that affect most, if not all, services, and are aimed at substantive liberalization. Although this standard is open to interpretation, it does establish a benchmark for determining the types of preferences that do not need to be extended on an MFN basis. Without some credible standard, we are concerned that the FTAA will add little to the plethora of trade agreements that already have emerged among FTAA participants. In any case, the FTAA should provide for MFN treatment among FTAA members for any matters covered by FTAA commitments. We would like to work with negotiators to ensure that article 3 of the investment chapter and article 2 of the services chapter address this issue adequately.

Acquired Rights: There does not appear to be language in the draft services or investment chapters that focuses on acquired rights. The FTAA should include a provision on acquired rights. Service providers already established in a market should not suffer a loss of rights due to insufficient, or graduated commitments in the final FTAA. To ensure a commercially meaningful Agreement, an acquired rights provision should stipulate "that the conditions of ownership, management, operation, juridical form and scope of activities as set out in a license or other form of approval establishing or authorizing operation or supply of services by an existing foreign service supplier, will not be made more restrictive than they exist as of the date of [the FTAA member's] enactment of the Agreement." Such a provision would thus prevent a loss of rights due to enactment of the Agreement.

Investment Chapter: The FTAA investment chapter must provide market access and national treatment for foreign investors. The draft FTAA investment chapter is a basis for developing strong disciplines that will promote investment throughout the region. Strong, enforceable rules, including investor/state dispute mechanisms, are needed to protect existing and attract additional investments. Such disciplines

should: cover both direct and indirect investment; ensure that FTAA participants do not maintain inconsistent domestic measures; and limit FTAA participants' application of quantitative restrictions, non-discriminatory market access barriers, and performance requirements to foreign investment.

Investor/State Disputes: Article 15 of the draft investment chapter discusses investor/state disputes. We believe that it is important that provisions similar to that of Article 1105 of the NAFTA investment chapter assure that parties are appropriately compensated under the dispute settlement mechanism in the event that a measure falling within such provisions is adopted. Parties must always retain their sovereign right to adopt measures they view to be in their interest. The investor/state dispute mechanism that is part of the NAFTA must be incorporated into the FTAA so that appropriate compensation is paid to foreign services providers when these measures merit it. Investors should continue to have access to arbitration as a means of settling disputes.

Domestic Regulation: The FTAA raises three critical components of domestic regulation: market access impediments, exemptions for domestic regulation, and transparency.

Market Access: Since adoption of the NAFTA and GATS, non-discriminatory domestic regulation has emerged as an important issue affecting market access for services. CSI believes the FTAA negotiations must be ambitious in developing rules and disciplines to address trade distortions caused by domestic regulation. These rules and disciplines must embrace but not be confined to issues of transparency alone, though CSI believes that obtaining meaningful commitments to transparency is a very important objective.

Exemptions: There remain bracketed entries in the services and investment chapters of the FTAA where obligations are qualified “subject to domestic legislation”. This language is unacceptable in any trade agreement -- it must be clear that domestic measures will be brought into conformity with this trade agreement. If not, this trade agreement becomes meaningless.

Transparency and Domestic Regulation: “Regulatory reform” has been given a great deal of attention by a number of U.S. industry groups in bilateral, regional, and multilateral negotiations. There is an increasing recognition, across many industries, that legally binding commitments to remove or lower trade barriers can be nullified by the decisions of national and regional governments, or industry standard setting and accrediting bodies, that are taken as part of regulatory processes.

It has become clear that regulatory “reform” has two aspects: 1) the need to ensure that regulations are fair, and that they are applied without regard to the nationality of the industry or company affected by them, and 2) that such regulations are formulated and applied in an open and transparent way.

The first aspect must be pursued separately within industry sectoral negotiations because the regulation is by definition specific to the industry being regulated. Reforming such regulations is for some sectors more important than others, depending on the goals of the industry in question. CSI strongly supports the efforts of the sectors to achieve their objectives and wishes to signal to negotiators the importance of this issue.

The second aspect, transparency in government regulatory processes and procedures, is a cross cutting issue affecting all sectors. CSI has proposed a framework of disciplines for regulatory transparency that it has made available to negotiators. It is attached to this paper as Annex I. It is not clear that all the elements of the proposed framework are in fact covered in the domestic regulation section of the services chapter or the transparency article of the investment chapter.

CSI strongly urges FTAA negotiators to pursue the negotiation of cross-cutting transparency disciplines such as those we propose in the Annex, and such as those achieved in the FTAs with Chile and

Singapore. CSI equally strongly supports the negotiation of special rules that meet the needs of specific sectors for fair regulatory practices, including regulatory reforms as are necessary and appropriate for a given sector.

Special and Differential Treatment for Developing Countries: CSI recognizes that 32 of the 34 FTAA participants are considered developing countries and that due accommodation of their economic needs is necessary. Some FTAA members have contemplated provisions that allow developing country participants to assume lesser obligations due to their economic status. Some of these provisions are taken from GATS. Unfortunately, this approach suggests that trade liberalization runs counter to a country's economic development interests, whereas the contrary is true. Though some developing countries may require additional time to transition to a liberalized FTAA trading regime or to develop technical capabilities to implement FTAA rules, the FTAA should clearly recognize that trade liberalization is a contributor to economic growth.

Current proposals for special and differential treatment, therefore, concern CSI because: (1) they undermine the inherent purpose of the FTAA, which is to provide free trade or at least a more ambitious level of trade liberalization than exists under the GATS; and (2) they provide opportunity for domestic interests to apply protectionist pressures that may impair economic development in the same countries we wish to help. A better way to address the special needs of developing countries is to help them tailor the scope of their commitments and phase-in provisions to their sectoral needs.

Trade Capacity Building Commitments: It also may be useful to consider some provisions for developing countries that will actually help them realize their trade opportunities under the FTAA. CSI suggests offering commitments to technical assistance to these countries to assist their trade-related capacity building, and to assist them to fully implement their FTAA obligations. In addition, consideration should be given to adopting aspects of GATS Article IV, which calls on industrialized countries to open their services markets to benefit developing countries' export strengths.

Government Procurement: Given its importance to services trade, CSI strongly endorses inclusion of a chapter on government procurement that applies to both goods and services. CSI has joined with other trade associations to submit a separate paper on government procurement rules in the FTAA.

Privacy and Freedom of Information Flows: Some FTAA members have suggested a provision that permits Parties to adopt measures necessary to ensure the observance of laws and regulations for the protection of the privacy of individuals. Considering the proliferation of divergent data protection laws in the Western Hemisphere, we suggest that parties agree to a balanced approach to data protection that recognizes differing national legal systems, including laws, industry self-regulation, and privacy enhancing technologies. Such a balanced approach should ensure that data protection regimes are not applied in a discriminatory manner and are not used to limit market access, to impede competition, or to impair necessary flows of business information.

CSI suggests the inclusion of the following language in the FTAA, drawn directly from Paragraph 8 "Transfers of Information and Processing of Information" of the GATS Understanding on Commitments in Financial Services. This text as modified, follows:

No Party shall take measures that prevent transfers of information or the processing of information, including transfers of data by electronic means, where such transfers of information or processing of information are used for the conduct of the ordinary business of a supplier. Nothing in this paragraph restricts the right of a Party to protect personal data, personal privacy and the confidentiality of individual records and accounts so long as such right is not used to circumvent the provisions of the Agreement.

Safeguards: The services chapter of the draft FTAA Agreement proposes language on special safeguards. CSI opposes safeguards provisions in the FTAA. The WTO debate on a safeguards provision has revealed important conceptual and practical flaws in the application to services of such a mechanism. It has also shown that even developing countries differ as to the desirability of a safeguard regime in GATS. A fundamental problem is the feasibility of establishing a basis for a safeguard. Trade data in services, compared to goods, is very imprecise. It would be virtually impossible to prove objectively that injury to a services industry is caused by imports. This is further complicated by the fact that so much of services trade is provided by way of establishment. A safeguard directed at established foreign services suppliers could mean either disestablishment or a freeze on new foreign services entrants. A freeze would simply provide foreign services companies having acquired rights a more dominant place in the market.

Subsidies: The services chapter of the draft FTAA Agreement proposes language on subsidies. The inclusion of subsidy disciplines applicable to trade in services resembles concerns raised in the safeguards debate, although it has received less attention. Again, the unique composition of trade in services, specifically the modes of supply, and the lack of comprehensive information on the existence and/or impact of subsidies in services trade create difficulties in the ability to accurately identify, measure, and discipline trade distorting subsidies.

Electronic Commerce: Language on electronic commerce is not included in the current draft FTAA text. The FTAA should include trade-liberalizing provisions that address electronic commerce issues affecting goods, services, and intellectual property. The services chapter should call for maximum liberalization in those services that constitute the infrastructure of the Internet, including basic telecommunications, value added services, and computer and related services (including such services as electronic naming and authentication); services that facilitate e-commerce, e.g. financial, distribution, advertising, and express delivery services; and services that are traded electronically, e.g. accounting services and educational services. The FTAA should also provide binding principles that support the maintenance of open markets for electronic commerce such as a commitment to avoid the creation of any unnecessary barriers to e-commerce, a commitment to provide products delivered electronically no less favorable treatment than that for similar products delivered in physical form, and where regulations are necessary, that they be as least trade-restrictive as possible. The FTAA should also ensure that firms are not restricted from using advanced technologies (hardware, software, technical data or know-how) in the conduct of their business.

The FTAA should include language like that in the U.S.-Singapore and U.S.-Chile FTAs on digital products. In e-commerce, both countries confirmed the importance of supplying services electronically, committed to nondiscriminatory treatment of digital products, agreed not to impose duties on digital products, and for hard media digital products agreed to base customs duties on the value of the media.

SECTORAL RECOMMENDATIONS:

Distribution Services:

- Limited exceptions to distribution services.

Energy Services:

- Market Access and National Treatment: The FTAA should include comprehensive market access and national treatment commitments for the entire range of energy and energy related services. Commitments should ensure that energy services providers could offer their services on a nondiscriminatory basis across all four GATS modes of delivery.
- Technological neutrality: Because of the rapid change in energy services technology, services commitments should be made without regard to the technology used.
- Temporary entry of business persons/specialists: Energy services providers often employ highly

trained persons and should have the right to the temporary entry of essential personnel to provide a covered service. We recognize that many other services providers have a similar interest.

- Unrestricted movement of electronic information and transactions : Many energy services today rely on electronic information flows and transactions, including geologic data analysis, trading and brokering, and energy efficiency services. The FTAA should ensure the free movement of these information exchanges and transactions.
- Develop a Reference Paper for energy services : Regulation and technical standards play a critical role in energy services. Indeed, regulations and technical requirements often are the key barriers to market entry and competition. The FTAA should incorporate a reference paper on energy services that would address the following issues relating to the activities of government and major suppliers of energy services: (1) transparency in the formulation, promulgation and implementation of rules, regulations, and technical standards; (2) non-discriminatory third party access to and interconnection with energy networks and grids; (3) an independent domestic regulatory system separate from and not accountable to any supplier of energy services; (4) transparent, objective and timely procedures for the transportation, transmission and distribution of energy; and (5) disciplines to ensure FTAA members work to prevent anti-competitive practices in energy services.

Environmental Services

- Rationalize the classification of environmental services to accurately reflect industry operations.
- Broaden and deepen the commitments in sewage services, refuse disposal services, sanitation and similar services, and other environmental services with a focus on cross-border trade, establishment, and movement of natural persons within the FTAA.

Express Delivery Services:

- It is crucial that the FTAA include provisions making clear the Parties' mutual commitment to fully liberalized trade in express delivery services.
- The express delivery services sector must be specifically recognized as a distinct service sector in the FTAA, defined as "the expedited collection, transport and delivery of documents, printed matter, parcels and/or other goods, while tracking the location of, and maintaining control over, such items throughout the supply of the service."
- All parties should immediately implement the eight business facilitation measures already adopted by FTAA Members at the Toronto Ministerial.
- All Parties should agree to maintain measures that prohibit anti-competitive behavior such as unfair cross-subsidization of express delivery services by service suppliers that enjoy government-conferred monopoly status in other sectors.

Financial Services:

- Support the creation of a separate negotiating committee on financial services to better address the complicated nature and diversity of financial services.
- Achieve cross-border commitments to the provision and transfer of financial information to include all users of financial information, including financial institutions, other providers of financial services, and retail customers.
- Expand cross border commitments across all financial services sub-sectors, including insurance, banking, securities, asset management, pension fund services, and commodities trading.
- Secure the right for financial services firms to establish themselves in the legal form that best facilitates their business objectives, whether it is through wholly-owned subsidiaries, joint ventures, or branches, and to operate freely in all participating markets.
- Remove "economic needs tests" and other geographic or product-specific restrictions applied with discrimination to financial firms from abroad.
- Commit to grandfather investment in operations and activities by foreign financial firms through presence already established.
- Schedule commitments to reflect actions taken to implement transparency.

- Schedule commitments to facilitate the temporary entry of key financial services personnel required for managerial, technological, systems or risk management purposes.
- Urge countries to make additional commitments to remove regulatory requirements that appear neutral on their face but, in actuality, serve to deny effective market access to foreign firms. These requirements include foreign investment restrictions, prohibition on delegation, high regulatory capital requirements, and local staffing requirements.
- Urge countries to take advantage of the current focus on pension reform around the world to address market access and other impediments to the ability of firms to manage retirement assets worldwide, in order to serve the best interests of retirees.
- Encourage countries to eliminate cumbersome requirements on U.S. institutional investors making portfolio investments.
- Adopt principles incorporated in a “model schedule” in insurance that set specific objectives for market access and national treatment, as well as encompass “best practices” that include non-discriminatory regulatory obligations, and specifically establish more precise undertakings with respect to the offering of new products and the speed-to-market objectives inherent in these products.
- Commit to mutual recognition of cross-border trade in insurance services without having to establish branches.
- Remove discriminatory treatment of capital requirements applied to foreign bank branches by financial regulators in certain WTO member states, especially in recognition of parent capital disciplines already in place for foreign banks whose supervisory authorities have implemented Basle or equivalent standards.

Telecommunications & Value-Added Network Services:

The FTAA should include a combined and improved version of the GATS Telecom Annex, Basic Telecom Reference Paper, and NAFTA Chapter 13 on telecommunications with appropriate additional commitments.

ANNEX I

FTAA Negotiators should obtain a commitment by all Parties to the following transparency criteria that should apply in all sectors. In short, FTAA Parties should commit to the adoption of an administrative procedures regime that would govern all its regulatory processes.

A. Standard-setting

To ensure non-discrimination in standard-setting, negotiators should seek agreement on the following general principles:

- All new (or revised) regulations should be available for public comment prior to adoption with adequate time for comments by service suppliers operating in (or seeking to operate in) the national market.
- To facilitate the notice and comment process, a public hearing should, when necessary and appropriate, be held to receive private sector input regarding proposed regulations.
- Government agencies should address the comments received from interested parties.
- New regulations should not be made effective until market participants have a reasonable period of time to become familiar with their contents and to take steps to implement them, except in emergency situations.
- New regulations should be drafted so that they are clear and understandable.
- Any hearings by government-sponsored advisory committees should normally be open to the public. When regulators or advisory committees hold private meetings that relate to pending regulatory proposals, a report of the substance of the meeting should be made available promptly to the public.

B. Regulatory Application Process

Negotiators should seek agreement on the following general principles:

1. All current regulations and licensing criteria should be publicly available and accessible in writing and through electronic media so that all market participants have easy access to such material. License applicants should be provided with a written statement setting out fully and precisely the documents and information the applicant must supply for the purpose of obtaining authorization.
2. Regulators should establish a mechanism to respond to inquiries on rules and regulations from service suppliers. Enquiry points for the public should be provided.
3. Regulatory interpretations and the grants of regulatory exemptions should be made available to the public on a prompt basis (subject to business confidential rules).
4. When an examination is required for the licensing of an individual, regulators should schedule such examinations at reasonably frequent intervals. Examinations should be open to all eligible applicants, including foreign applicants.
5. Actions on any application for a license should be taken within a reasonable period of time. Licenses should enter into force immediately upon being granted.

6. No service supplier should be denied a license, and no new service should be prohibited, on the basis of any factor not identified in the published written regulations or interpretations.
7. When an application for a license or other regulatory status is denied, regulators should provide a detailed explanation for that action, including the particular requirements that were not satisfied. Applicants should be given the opportunity to resubmit applications or to file additional or supplementary material.
8. Fees charged in connection with licenses should be fair and reasonable and not act to unreasonably limit licensing requests or the introduction of new products and services.
9. Confidential information provided by an applicant should not generally be disclosed. Disclosure of such information should occur only in accordance with established rules permitting public disclosure.

C. Judicial, Arbitral, or Administrative Tribunals

Negotiators should seek agreement on the following general principles:

1. Service providers should have an opportunity to file a complaint about inconsistent enforcement between foreign and domestic providers.
2. Service providers should have an opportunity to file a complaint about arbitrary regulatory action against those who give comments in regulatory hearings.
3. Applicants should have an opportunity to file a complaint in the event that a license application is refused review or a decision is delayed by the relevant authority.
4. Applicants should have an opportunity to file an appeal in the event that a license application is denied. Appeals should be decided within a reasonable period of time.
5. In any regulatory enforcement proceeding, the service supplier should be notified in a timely manner about the proceeding and should be given an opportunity to be heard and to submit documentary evidence. Subjects of regulatory proceedings should have the right to legal counsel of their choice. The subjects of regulatory proceedings should be permitted access to evidence.
6. The burden of proof to demonstrate that a licensed market participant has not conducted its business in accordance with the relevant law should lie with the regulatory authorities.
7. Disciplinary actions should not be taken on violations of regulatory standards that were not in effect at the time the relevant activity took place.
8. Sanctions by a regulatory authority should not be imposed in an unfair or discriminatory manner. Regulators should treat similarly situated persons and entities in a similar manner.
9. The subjects of any regulatory enforcement proceeding should have an opportunity to appeal any enforcement finding or sanction imposed.